

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.
--

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MILTON EARLS,

Defendant and Appellant.

G026237

(Super. Ct. No. 98SF0768)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jacob H. Jager, Judge. (Retired judge of the Mun. Ct. of San Bernardino, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Dismissed.

Cindi B. Mishkin, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Raquel M. Gonzalez and
Robert M. Foster, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal following a guilty plea, Milton Earls challenges an integral part of his plea bargain: Earls argues his agreement to serve separate full-term sentences for felonies he committed in two different counties unwittingly deprived him of the right to have the two sentences aggregated (and thereby shortened) under Penal Code section 1170.1¹ and California Rules of Court, rule 452. He contends he was unaware of that right and thus did not knowingly waive it when he agreed to the negotiated plea.

Unhappily for Earls, he failed to obtain a certificate of probable cause, a prerequisite to mounting such a challenge. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76, 78.) Moreover, his specious attempt to evade the certificate requirement by characterizing the “full-term consecutive” aspect of the sentence as a term improperly “added” by the trial court, rather than something bargained for in the plea agreement, lacks any merit. We therefore dismiss the appeal.²

* * *

Pursuant to a plea bargain, Milton Earls pleaded guilty to eight felony theft offenses and admitted a prior strike. For its part, the prosecution agreed to dismiss another 16 counts, and to allow the sentence on each of the eight admitted counts (16 months, doubled because of the prior strike) to run concurrently. The written plea agreement provided Earls would serve the 32-month prison term “consecutive to any other commitment.”

At the time Earls entered into this plea agreement, he was already serving a 32-month prison term, having earlier pleaded guilty to a second-strike drug charge in Sacramento County. The Orange County Superior Court judge who accepted Earls’s

¹ All further statutory references are to the Penal Code.

² The People’s alternate ground for dismissal, that the notice of appeal was untimely, fails to take account of the prison delivery rule. (See *In re Jordan* (1992) 4 Cal.4th 116, 130.) Under that rule, Earls’s notice was timely filed.

guilty plea specifically inquired as to Earls's understanding of the provision in the plea agreement that the term would be "consecutive to any other commitment."

"THE COURT: What we proposed to do in sentencing, is to make each of the counts concurrent to each other. I will sentence you to count 1 and all the remaining counts will be concurrent to count 1, but they will be consecutive to any other sentence that you are now legally obligated to serve. [¶] Do you understand that, sir?

"[EARLS]: Yes.

"THE COURT: That means you will be sentenced to thirty-two months in state prison consecutive to your current time, which means that time on this case will start on your release date for anything that you're now being held for, which is the marijuana charge commitment. [¶] Do you understand that, sir?

"[EARLS]: Yes, your honor."

Satisfied there was mutual assent to the terms of the plea agreement, the court advised Earls of his constitutional rights, and accepted his waivers and guilty plea. The court then immediately sentenced Earls to 32 months in prison, ordering the term to be served consecutively to the sentence imposed in the Sacramento case.

On appeal, Earls challenges the imposition of a full-term consecutive sentence as a violation of the statutory requirement that serial judgments imposing consecutive terms be aggregated into a single, unified judgment, with principal and subordinate terms designated. (See § 1170.1, subd. (a); Cal. Rules of Court, rule 452.) Under the statutory scheme, a defendant benefits from aggregation because he or she will serve only "one-third of the middle term of imprisonment prescribed" for each subordinate term. (§ 1170.1, subd. (a).) For Earls, aggregation under the statutory scheme would have meant a four-year sentence (32 months on the principal term, one year four months on the subordinate term) rather than the total term of five years four months to which he is currently sentenced (32 months under each of the two judgments).

Earls concedes that at the time he entered his guilty plea, he understood “the time imposed on the Orange County case would not start until his release date on the Sacramento County case.” Nonetheless, Earls argues he should be able to avoid a full-term consecutive sentence because he was not advised of his right to have the two sentences aggregated (and shortened), and thus did not knowingly and intelligently waive that right. He asserts he is entitled to an aggregated four-year sentence (in effect, a 16-month reduction of his prison term).

The People respond that Earls may not attack the term he bargained for as part of the plea agreement without first obtaining a certificate of probable cause. (*People v. Panizzon, supra*, 13 Cal.4th at p. 78 [“by contesting the constitutionality of the very sentence he negotiated as part of the plea bargain, defendant is, in substance, attacking the validity of the plea. For that reason, . . . the certificate requirement of section 1237.5 applies”]; see also Cal. Rules of Court, rule 31(d).) Earls concedes the rule, but argues it does not apply here because the “full-term consecutive” aspect of the sentence was not a negotiated part of the plea bargain. He asserts it was “added” by the court, and thus his challenge is not to the validity of the plea, but to the court’s “breach” of the plea agreement and resulting unauthorized sentence.

Earls hangs his hat entirely on the fact the written plea agreement stated the 32-month prison term would be “consecutive” to the Sacramento sentence, rather than “full-term consecutive.” He argues these legal terms differ significantly and the parties would have specified “full-term consecutive” had that been their intent.

We need not speculate as to the parties’ intent because the trial court specifically inquired into that very issue. In its colloquy with Earls before he entered his plea, the court carefully explained that under the terms of the plea agreement, the 32-month sentence would start only after his release date for the earlier commitment. Earls agreed this was his understanding of the bargain. Neither Earls’s lawyer, nor the prosecutor, objected to the court’s characterization of the agreed sentence as being full-

term consecutive to the Sacramento sentence. In light of this record, we conclude the court's imposition of a full-term consecutive sentence merely imposed the sentence Earls bargained for in the plea agreement. Consequently, Earls's appellate challenge to this sentence is barred by the lack of a probable cause certificate.

The appeal is dismissed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.